FILE COPY

In the Supreme Court

OF THE

United States

Office Supreme Court, U. S.
FILED
JAN 9 1940
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1939

No. 587

UNITED STATES OF AMERICA,
Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO
(a municipal corporation),
Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN J. O'TOOLE,
City Attorney
of the City and County of San Francisco,
DION R. HOLM,
Assistant City Attorney
of the City and County of San Francisco,
City Hall, San Francisco, California,
Attorneys for Respondent.

ROBERT M. SEARLS,
Standard Oil Building, San Francisco, California,
Of Counsel.

BYRNE-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

	Page
Questions Presented	2
Statute Involved	2
Rulings of the Courts Below	4
Statement of Facts	5
The Position of the Secretary of the Interior	12
Government's Specification of Error	14
Reasons for Denial of Writ	15
A. The meaning of Section 6 of the Raker Act	15
1. Interpretation by government officials	15
2. Analysis of Section 6 supports the "sale for resale" construction	17
B. Legislative history of the statute	21
C. No question of importance in this case justifies review by the Supreme Court	28

Table of Authorities Cited

Cases

	Pages
Borland v. Nevada Bank, 99 Cal. 89, 33 Pac. 737	18
Brewster v. Gage, 280 U. S. 327	16
Cole v. Laird, 121 Iowa 146, 96 N. W. 744	19
Colorado-New Mexico Wool Marketing Assn. v. Manning, 96 Colo. 86, 40 Pac. (2d) 972 (1935)	12n
Dryden v. Michigan State Industries, 66 Fed. (2d) 950 (C. C. A. 8, 1933)	12n
First National Bank v. Kilbourne, 127 Ill. 573, 20 N. E. 681 (1889)	12n
Klein, In re, 3 Fed. (2d) 375 (C. C. A. 2, 1924)	12n
Lambeth Rope Co. v. Brigham, 170 Mass. 518, 49 N. E. 1022 (1898)	12n
Los Angeles Gas & Electric Corporation v. City of Los Angeles, 188 Cal. 307, 205 Pac. 125	12n
Mansfield v. District etc. Assoc., 154 Cal. 145, 97 Pac. 150	19
McLaren v. Fleischer, 256 U. S. 478	17
Speigle v. Meredith, 22 Fed. Cas. No. 13,227, p. 911 (C. C. Ind. 1868)	18
United States v. Minnesota, 270 U. S. 181	16
Wisconsin v. Illinois, 278 U. S. 367	17

Statutes

Raker Act:	
Section 6	2, 4, 7, 13, 14, 15, 16, 17, 18, 20, 21, 24, 25
Section 9	2, 3, 7, 14, 24, 25
Section 11	2, 3, 6

Miscellaneous

Analysis of bill presented by Senate Committee, October 4, 1913	21
Congressional Record:	
Vol. 50, pp. 462, c. 2; 3980, c. 1; 3996, c. 2; 4094, c. 2	22
Vol. 50, pp. 4096-4097	22
Vol. 50, p. 5453	21
Vol. 51, p. 301	23
H. Rept. 41, 63d Congress, 1st Sess. 1913, p. 11	21
Report on H. R. 6281, dated June 25, 1913, p. 123	23
54 Land Decisions 316	13
Mechem on Sales, Vol. 1, Sec. 25, p. 27	12n
Standard Dictionary definition of "let"	18

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1939

No. 587

UNITED STATES OF AMERICA,
Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO
(a municipal corporation),
Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

The City and County of San Francisco herewith replies to the petition for writ of certiorari filed by the Solicitor General on behalf of the United States in the above entitled matter, and prays that said petition be denied.

QUESTIONS PRESENTED.

The City does not accede to the Government's description of the contract involved in the case, nor does it agree that under the contract the Pacific Gas and Electric Company bears the risk of loss of energy delivered to it or is obligated to pay the City at a price fixed without regard to the price the Company receives from the consumers for all energy delivered or available for delivery under the contract. Nevertheless, we shall of course direct this reply to the questions as stated by the Government, although we do not consider that they are correctly stated.[1]

STATUTE INVOLVED.

The Government has quoted only one portion of the Raker Act of December 19, 1913—Section 6. This clause should be read in conjunction with the following additional provisions of Sections 9 and 11:

> "*Sec. 6.* That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

---

[1] The Government's statement of the first question recites that the effect of the agreement is to "grant to the Company" the right to sell energy. The word "grant" used in this connection is deceiving in that one who employs an agent to sell anything for his account in a sense grants him the right to sell it, but the word "grant" as used in law implies some form of a conveyance of title or a property right of some sort. There is no suggestion in the contract that the Company has any property right in the energy at all. A fair description of the effect of the contract would be to say that it employs the Company to sell and distribute energy as the City's agent and for the City's account.

Section 9:

"(1) * * * Provided, That said grantee shall satisfy the needs of the landowners in said irrigation districts for pumping subsurface water for drainage or irrigation, and the needs of the municipalities within such irrigation districts for actual municipal public purposes, *after which it may dispose of any excess electrical energy for commercial purposes.*"[2]

* * * * * * *

"(m) * * * The said grantee shall within three years from the date of completion of said portion of the works install, operate, and maintain apparatus capable of developing and transmitting not less than ten thousand horsepower of electric power for municipal and commercial use, said ten thousand horsepower to be actually used or offered for use; and within ten years from the completion of said portion of the works not less than twenty thousand horsepower; and within fifteen years therefrom not less than thirty thousand horsepower; and within twenty years therefrom not less than sixty thousand horsepower, unless in the judgment of the Secretary of the Interior the public interest will be satisfied with a lesser development. The said grantee shall develop and use hydroelectric power for the use of its people and shall, *at prices to be fixed under the laws of California* or, in the absence of such laws, at prices approved by the Secretary of the Interior, *sell or supply such power for irrigation, pumping, or other beneficial use,* * * *".

* * * * * * *

"*Sec. 11.* That this Act is a grant upon certain express conditions specifically set forth herein, and *nothing herein contained shall be construed as affect-*

[2]Italics used in this reply have been supplied by the writers unless otherwise noted.

ing or intending to affect or in any way to interfere with the laws of the State of California relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with the laws of said State."

STATEMENT.

Rulings of the courts below.

A fair consideration of the Government's petition requires that the statement of facts set forth therein be criticised and supplemented. The District Court did *not* hold that Section 6 of the Raker Act prohibited an agency contract. The court said (R. 120-121) that electric energy was a peculiar kind of property, and that it might be difficult to draw an agency agreement for its disposal. But it did not hold that if the agreement in question is an agency agreement it is prohibited by Section 6 of the Raker Act.

There was no dissent in the Circuit Court of Appeals. While three judges heard the argument, one of them (Judge Denman) deemed himself disqualified, subsequent to submission, and did not participate in consideration or decision of the case (R. 677). The Government is therefore asking the Supreme Court to pass on a question which was not decided by the District Court, and which was unanimously decided by the Circuit Court of Appeals adversely to the Government's contention. The latter court said (R. 674):

"The contention of the United States that the Raker Act forbids the City from contracting with a private company for the distribution of the electric energy by such company as agent for the City is clearly without merit. There is nothing in Section 6 of the Act prohibiting the City from distributing the energy by an agent. It is elementary, of course, that a sale by an agent is the sale of the principal."

THE FACTS.

The Government's statement of facts we feel gives the court an entirely inadequate picture of the situation. After enactment of the Raker Act in 1913 the City proceeded to build the Hetch Hetchy project and expended some $89,600,000 in its construction (R. 373. Stricken out, 453). The only use made of the public lands granted to the City, in so far as this case is concerned, was to furnish a part of the main storage reservoir site, the diversion dam site, and part of the tunnel aqueduct through which the waters were carried to the City's power plant on Moccasin Creek in the Sierra Nevada Mountains (R. 305—Defdts. Map Exh. A). This power house and the transmission line leading from the same across the San Joaquin Valley to Newark (35 miles southeast from San Francisco (R. 161)), was located and constructed entirely on patented lands acquired from private persons by the City (Defdts. Map Exh. A). The right to divert and use the waters of the Tuolumne River in the generation of power at the Moccasin Creek plant was acquired entirely under the laws of the State of California (Offers of proof, R. 444-447—Rejected), and

the Raker Act (Section 11, *supra*) expressly disavows any attempt on the part of Congress to interfere with the application of those laws. There was, it is true, a small construction power plant near the head-works of the project, known as the Early Intake plant, which was situated entirely on Government land, and which was designed primarily to furnish power for construction purposes (R. 411). Some surplus energy was developed at this plant and transmitted to the Moccasin plant, where it was added to the output of that plant, amounting in quantity to less than 3 per cent of the total output of the Moccasin plant (R. 281). Therefore 97.1 per cent of the energy affected by the contract in question is generated by the City in a power plant constructed entirely on its own property, not acquired from the Government, with water appropriated under the laws of the State of California, not under the Raker Act, although this water is stored in part and transmitted, in part on and over lands granted under the Act. The value of the lands granted to the City by the Government was $244,139.75 (R. 315), whereas the City has delivered to the Government lands and rental payments in exchange aggregating $2,702,607 in value (R. 326).[3]

The City has no publicly owned distribution system of its own, had none at the time the Raker Act was enacted, and made no representations whatever to Congress that it would acquire or own a municipal distribution system. Indeed, at the time the Raker Act was passed the City's plans contemplated the utilization of the electric energy to be generated at the Moccasin power plant for pumping

[3]This testimony was later stricken out on the Government's motion (R. 559-561).

its water supply over the Coast Range Mountains. Later on it was learned from engineering investigation that the Coast Range could be successfully tunneled and the water delivered to San Francisco by gravity flow. It resulted that the greater part of the Moccasin power plant output which it had been believed when the Raker Act was under consideration by Congress would be required for pumping water over the Coast Range became available for other uses and subject to disposal under the other provisions of the Act.[1] Congress in Sections 9(m) (n) and (o) of the Act, dealing with the City's disposal of surplus energy, did not even suggest that it must be made through a publicly owned distribution system.

There were two alternative methods by which it was physically possible to distribute the energy which the terms of the Raker Act required the City to generate and dispose of as a part of the Hetch Hetchy water supply project. One would be to build or acquire a publicly owned distribution system; the other would be to enter into some contractual arrangement, not within the prohibition of Section 6 of the Raker Act, by which this energy could be transmitted and delivered to the people of the City, as contemplated by the Act. While the City's municipal charter provides for the gradual acquisition and ultimate ownership by the City of its public utilities (R. 664), its electorate no less than seven times refused to authorize the necessary financing for the acquisition or

[1] The above facts were set forth in the City's offer of proof (R. 424-426), but the trial court excluded the testimony as irrelevant (R. 428). The Circuit Court of Appeals assumed the facts to be either proven or provable (R. 665).

construction of a public distribution system (R. 377—Defdts. Exh. G—not admitted), and the City was and is by force of circumstances, required to utilize the second alternative until its electorate authorizes it to finance the acquisition of a publicly owned system. This alternative of an agency contract was suggested at least two years before the signing of the contract involved by the then Solicitor of the Department of the Interior (R. 352-354) in dealing with surplus power sales from the small Early Intake plant. Following receipt of these views from the Solicitor of the Department of the Interior in 1923, two years later and upon completion of its Moccasin Plant, the City entered into the contract in question. At the time of making this contract the City was faced with the situation that the consumers' demand for electric energy in San Francisco, particularly during peak hours, was in excess of the maximum output of its power plant (R. 291). It was therefore absolutely necessary that the energy to be delivered from the Moccasin plant be supplemented by energy generated by the Pacific Gas and Electric Company, and that the latter company also furnish adequate standby service to protect the consumers in the event of interruption due to storms, plant breakdowns, etc. It was impossible to segregate a portion of the Company's distribution system under the contract and say that certain parts of its distribution facilities should be utilized solely for transmission and distribution of the City's energy. They had to be tied in also with the lines bringing energy from the Company's generating plants in order that the City's delivery might be properly supplemented to meet consumers' demands. Recognition of these facts

is essential to an understanding of the provisions of the contract (R. 6 [redacted]).

The parties to the contract then proceeded to ascertain certain actual operating facts as a basis for their agreement. These included the average load factor of the San Francisco system, the actual average transmission and distribution losses between the terminus of the City's transmission line at Newark and the consumers' meters in San Francisco, and the average revenues received by the Company under rates prescribed by the California Railroad Commission for all energy distributed in the San Francisco territory (R. 431-436). They also ascertained the Company's cost of distribution, including a fair return to it based on the value of its distribution system. The parties then executed the contract of July 1, 1925, which requires the Company to accept for delivery at a 75% load factor all of the energy output of the Moccasin plant (which was always less than the total consumers' demand in San Francisco), to subtract from that 24 per cent of the total energy delivered, representing actually experienced distribution losses, and to distribute, meter, and collect the standard rates for the rest of it (that is, 76 per cent), furnishing required standby service and additional energy required; and to account for the proceeds.

The proceeds to be accounted for were obtained by multiplying the quantity of energy delivered by the City at Newark (less 24 per cent) by the average return per kilowatt hour actually being received by the Company under legally established rates, namely, 2.383 cents. The Company was permitted to retain 73.065 per cent of these proceeds as its compensation for services rendered and the

City was to receive the rest (R. 294, 83). The rates to be charged consumers were required by the contract to be the rates legally established for the sale of electric energy (i. e., by the State Railroad Commission) (R. 81). In the event that any change in the then established rates for the sale of electric energy should take place by order of the State Railroad Commission; the amount to be retained by the Company and the amount to be paid by the City was to be proportionately increased or decreased. Several decreases in rates took place during the twelve-year period that the contract had been in operation before the present suit was brought, but due to the fluctuation in quantities of energy delivered under various rate schedules the actual difference between the total amount collected by the Company under the rates actually charged and the total amount which would have been collected under the rates in force at the time the contract was made only amounted to $25,000 for the twelve years of operation, as compared with over $26,000,000 paid to the City. At the time of commencement of the action no adjustment had been made between the parties for this decrease (R. 288). The contract by its terms was terminable on one day's notice, from either party to the other.

The City therefore had two means of controlling the situation with respect to the rates to be charged its inhabitants. First, under the contract it prescribed that the rates should not exceed those fixed by lawful authority, to-wit, the State Railroad Commission; and, second, it reserved the right to terminate the agreement on one day's notice at any time. The Company, on the other hand, was never in a position where it could either fix the

rates to the consumers or retain a monopolistic control over the supply of their energy because the City at any time on one day's notice could step in and take over the contract whenever it should acquire the physical means to effect distribution of the energy. The rate of generation is not controlled by the Pacific Gas and Electric Company's load dispatcher except that he, under the provisions of the contract, transmits to the power house at Moccasin Creek the daily fluctuations in the consumers' demands (R. 670, 291). The consumers themselves control the amount of energy to be taken, and the provisions of the contract require the Company and its load dispatcher to call upon the Moccasin plant up to 75 per cent of its maximum load capacity for the energy thus demanded by the consumers (R. 81, 82). It is true that the Company does not and cannot segregate on the bills to each consumer the number of kilowatts which come from the City's plant and the number of kilowatts which come by way of supplement from the Company's system. It is also true that the City, as a consumer of energy in its municipal railways, street and public building lighting, is charged by the Company at regular contract rates for energy having the characteristics required for these several businesses (R. 286, 292-293). The energy delivered and consumed by the City has been transmitted 35 miles and is delivered at a voltage and frequency radically different from that of the energy which it delivers to the Company at Newark. It of course is properly billed to the City at rates which include the value of services which the Company has performed upon it in transmitting it

from Newark to San Francisco, stepping down the voltage, and, in some instances, converting the frequency.[5]

THE POSITION OF THE SECRETARY OF THE INTERIOR.

The Government's statement of this position is incomplete. It is true that as soon as the contract was executed, the City submitted it to Secretary Work in 1925, who saw no reason or authority under the provisions of the Raker Act to formally approve it (R. 356). However, his Solicitor (Mr. Wright) in a letter to him approved its legality (R. 359-366) saying: "* * * This is not a contract of sale or lease, but rather one of agency, and that no evidence of a violation of the inhibitions of Section 6 of the Raker Act is presented by this contract;" (R. 234-235). Secretary Work also referred it to Attorney General Sargent, who took the same

---

[5]A contract very similar to this one was upheld by the Supreme Court of California as a contract of agency and not of sale, and not violative of provisions of the Los Angeles Charter, which, even more stringently than Section 6 of the Raker Act, prohibited that city from selling to private corporations for resale purposes electric energy generated by the city on its Owens River project. See *Los Angeles Gas & Electric Corporation v. City of Los Angeles*, 188 Cal. 307, 312, 205 Pacific 125.

Fungible property has repeatedly held to be subject to agency contracts, as, for example, in grain elevators.

Mechem on Sales, Vol. 1, Sec. 25, p. 27;
Dryden v. Michigan State Industries, 66 Fed. (2d) 950 (C.C.A. 8, 1933);
In re Klein, 3 Fed. (2d) 375 (C.C.A. 2, 1924);
Colorado-New Mexico Wool Marketing Assn. v. Manning, 96 Colo. 86, 40 Pac. (2d) 972 (1935);
Lambeth Rope Co. v. Brigham, 170 Mass. 518, 49 N. E. 1022 (1898);
First National Bank v. Kilbourne, 127 Ill. 573, 20 N. E. 681 (1889).

position as Secretary Work (R. 235). Three years later the Secretary called the City's attention to the fact that it was deriving revenues from power development under this contract, and that a portion of those revenues should be used to complete certain Yosemite Park road construction required under the Raker Act (R. 333). Secretary Wilbur's letter to the Mayor of San Francisco, referred to in the Government's statement (p. 7), did not state that continuance of the contract would be disapproved. The memorandum referred to in the opinion of Secretary Ickes (R. 238-239) was not approved by Secretary Wilbur, but was merely transmitted as being some unnamed person's views in his department. Secretary West, who preceded Secretary Wilbur, never questioned the City's action at all. It thus appears that neither Secretaries Work, West nor Wilbur ever took any adverse action with respect to the agreement in question, and it was not until Secretary Ickes took the matter up in August, 1935, after the contract had been in effect ten years, that the question was ever raised seriously by any Secretary of the Interior. His Solicitor (Mr. Margold), had advised him in 1933, that Section 6 prohibited a sale for resale, but did not interpret the section as prohibiting an agency contract (54 Land Decisions 316).

There is no evidence of any kind in the record to the effect that the Pacific Gas and Electric Company is making any inordinate profit out of the distribution of the energy, or that the rates charged to the consumers in San Francisco are any higher than they would be under direct municipal distribution, or that any benefit would result to any one through a termination of the contract. Such ter-

mination, on the other hand, would leave the City with no means of distributing the energy, the generation of which is made mandatory under Sections 9 (l), (m), and (n) of the Raker Act, and would cause its taxpayers a loss in revenue of $2,200,000 per year, and a possible shortage in power to meet consumers' demands (R. 416-418; offers of proof rejected).

SPECIFICATION OF ERROR.

The Government's petition states (Foot-note, p. 8) that the sole specification relied upon for granting a writ of certiorari is, the holding of the Circuit Court of Appeals for the Ninth Circuit that Section 6 of the Raker Act does not prohibit the grant to a private corporation of the right to sell electric energy originating at Hetch Hetchy, as agent for the City. We shall address ourselves to this specification, pausing only to quote the actual language of the opinion of the Circuit Court of Appeals (R. 674) as showing that the Government's use of the words "granting to private corporations" in its petition (p. 7) is inept and a misleading statement of the position of the Court of Appeals. The Court said, as we have pointed out:

> "The contention of the United States that the Raker Act forbids the City from contracting with a private company for the distribution of the electric energy by such company as agent for the City is clearly without merit. There is nothing in Section 6 of the Act prohibiting the City from distributing the energy by an agent. It is elementary, of course, that a sale by an agent is the sale of the principal."

It is obvious therefore that the Circuit Court of Appeals did not hold that the City "granted" the Company any rights. It treated the relationship purely as one of contract employing an agent. The Government's specification should be given this construction in order to avoid misunderstanding.

REASONS FOR DENIAL OF WRIT.

The Government argues that the court below has passed upon an important question of Federal law which has not been settled but which should be settled by this court. We of course do not contend that the Raker Act is not a Federal grant or that this court has ever interpreted it. We reserve for the conclusion of this reply the point as to whether the question involved is an important one justifying review by the Supreme Court.

A. THE MEANING OF SECTION 6 OF THE RAKER ACT.

(1) Interpretation by Government Officials.

The Government correctly states that Section 6 prohibits the selling of the right to sell energy, and that the City construes that prohibition as forbidding the selling of the energy with the right of resale. This construction of the Act is in entire accord with every contention ever made by any representative of the Government prior to submission of its closing brief in the District Court, following trial of this case in October, 1937. The debates in Congress, the opinions of three Solicitors of the Interior Department, Edwards, Wright and Margold, hereinbefore

referred to, the Bill of Complaint herein (R. 6), the opening statement of counsel for the Government at the trial of this action (R. 190-192) and his position stated throughout the trial (R. 341, 427), the Government's opening brief in the District Court filed November 4, 1937, and curiously enough, in the Government's supplemental brief for appellee, United States, filed in the Circuit Court of Appeals herein (p. 8), where Government counsel say "The prohibition of the statute is against the granting to an individual or private corporation of the right to sell."—all the foregoing expressions of Government official opinion are to the effect that Section 6 prohibits a sale for resale—nothing else.

The language of Section 6 prohibiting sale for resale purposes or sale of energy with right of resale is not at all ambiguous. However, if the opposite were true and some ambiguity were found in the section, a construction of the Act which is in accord with the tenor of the debates in Congress, the opinions of the Solicitors of the Interior Department, and with the expressed views of the Secretaries of the Interior, should be followed by the courts in interpreting the section.

In *Brewster v. Gage*, 280 U.S. 327, 336, this Court held:

> "• • • It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons."

Again, in *United States v. Minnesota*, 270 U.S. 181, 205, this Court said:

> "* * * So, even if there were some uncertainty in the act, we should regard this long-continued and uniform practice of the officers charged with the duty of administering it as persuasively determinative of its construction."

See also:

McLaren v. Fleischer, 256 U.S. 478, 481;
Wisconsin v. Illinois, 278 U.S. 367, 413.

(2) Analysis of Section 6 supports the "sale for resale" construction.

Analysis of the language of Section 6 supports this official interpretation by Congress, by Secretaries of the Interior and their Solicitors, and by counsel for the Government in this case. For convenience we quote it here again:

> "Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

Stripped of all unnecessary verbiage, Section 6 does only two things. It prohibits the grantee from "*selling*" the "*right to sell*" energy "*sold*" to any private person or corporation by the grantee. It prohibits the grantee from "*letting*" the "*right to sublet*" the electric energy "*given*" to any private person, firm or corporation by the grantee. The word "*given*" as used in the last line clearly refers to the energy delivered to a lessee or a vendee. It does not mean a gift. Congress cannot be presumed to have prohibited the City from making a

"gift" of public property, a thing which would be absolutely contrary to the laws of California, and an absolutely unnecessary provision. The word "sold" takes care of electric energy to which the title has been transferred through a sale, and the word "given" may be logically construed as taking care of the other prohibited transaction, namely, a letting or leasing of electric energy to be delivered—that is, given—under a sublease to some one else. The words "let to" and "sublet to" can only have the meaning of lease. Otherwise the preposition "to" would not have been included (R. 677).[6] As the Act reads, its prohibitions appear in pairs—"selling and letting", "sell and sublet", and "sold and given". We submit that our interpretation of this language coincides with the views of the legislators expressed in Congress, and is the correct view for the court to take. It follows therefore that if the contract under discussion does not sell the energy to the Company for resale or does not let it to the Company for subletting purposes, it does not violate Section 6.

The cases cited by the Government in support of its construction (so we submit) lend no aid to its contention.

Speigle v. Meredith, 22 Fed. Cas. No. 13,227, p. 911 (C. C. Ind. 1868), cited on page 9 of the Government's petition, holds that a conveyance of lands in consideration of personal property or choses in action (in that case, coupon bonds) is strictly and literally a "sale".

Borland v. Nevada Bank, 99 Cal. 89, 93, 33 Pac. 737, cited on page 9 of the petition, holds that a sale implies

[6]See Standard Dictionary definition of "let".

a reciprocal transfer of property for compensation, which compensation may be past, present, or future, whose value in money is agreed upon between the parties. The price must be definite, or the agreement must contain such elements that the price can be ascertained therefrom. In addition to the necessity for a price there must be the assent of the parties that the transaction shall be a sale. The question in that case was whether securities deposited with the bank were sold or placed there as collateral.

In *Mansfield v. District etc. Assoc.*, 154 Cal. 145, 147, 97 Pac. 150, 151, cited at page 9 of petition, title to certain lots was transferred to defendant in trust, to be "sold or otherwise disposed of" for the purposes of meeting expenses of a Fair. Certain of these lots were conveyed in exchange for legal services. It was held that the power to sell "or otherwise dispose of" was broad enough to cover such an exchange.

In *Cole v. Laird*, 121 Iowa, 146, 149, 96 N.W. 744, cited on page 9 of petition, the plaintiff sued for the purchase price of two windmills which he alleged he had sold to the defendant. The latter denied the sale, claiming that he had received them as agent. A directed verdict for the plaintiff was reversed on appeal, the Supreme Court of Iowa holding:

> "A sale involves something more than the delivery of goods to another. It must appear also that a transmutation of property from one to another for an agreed price was *intended*."

Each of these four cases cited by the Government, it will be noted, involved a change of title and a definite ascer-

tainable value in terms of money rendered or to be rendered to the grantor. None of the cases involved, as here, the consignment to an agent upon terms prescribed by the principal, of fungible property to be sold for the principal's account. None of the Government's cases involved a prescription by the principal of the price to be charged, whereas the contract under review contains a requirement that rates be fixed by the public authority which is regularly vested by law with such functions.

Equally inappropriate are the citations by the Government on page 9 of its petition of cases defining the scope of the word "give". Each of these cases holds that the word "give" is often used with a meaning other than that of a gratuitous delivery and that, dependent on the context in some instances, it may be synonymous with delivery for a consideration or in exchange. No contention has been made in this case that the word "give" in Section 6 of the Raker Act refers to a gift by the City, or that either Congress or the City ever intended that the City should give away gratuitously its electric energy. Taking into consideration the context of Section 6, as we have hereinabove pointed out, the word "give" is correlated with the words "let" and "letting" and undoubtedly refers to delivery and disposal by lease as contrasted with delivery and disposal by sale. If the contract of agency involved here is not a delivery or disposal by either sale or lease, then it is clearly within neither of the two prohibitions in Section 6. The City has not "sold" to the Company the right to make sales any more than it has sold to its Mayor the right to govern the City or "sold" to the contractors who built the Hetch Hetchy project the right to build such

project, or "sold" to any of the hired agents through which a corporation alone can carry out its functions, the right, privilege, and duty to exercise the functions of their respective offices or employments. With this distinction in mind, the fallacy of the Government's reasoning in interpreting Section 6 is apparent.

B. LEGISLATIVE HISTORY OF THE STATUTE.

We are in accord with the principles of law upheld by the two authorities cited by the Government on page 11 of its petition to the effect that the legislative history of a statute may be examined for the purpose of determining its general purpose, although not for the purpose of construing particular language. We submit that an examination of the legislative history of the Raker Act, including the portions quoted by the Government in its petition, indicates that it was not the intent of Congress to prevent selling of electric energy for the City's account by an authorized agent so long as no title passed to the agent and the agent was not in a position to exercise monopolistic control or to make a profit out of the generation of the energy through utilization of the public lands granted under the Act. The reports of both the House and Senate Committees on Public Lands, as pointed out by the Government, state that the provision is designed to prevent any monopoly or private corporation from obtaining control of the water supply of San Francisco (H. Rept. 41, 63d Congress, 1913, p. 11. Analysis of Bill Presented to Senate by Senate Committee, October 4, 1913, Vol. 50, Cong. Rec, p. 5453).

The bill as originally drawn provided only a prohibition of selling or subletting the water sold. The introduction of the words "or electric energy" is explained in the statement of Representative Thompson of Illinois on August 30, 1913, Vol. 50, Cong. Rec., pp. 4096-4097. We quote from the record as follows:

> "Mr. Thompson of Illinois: Mr. Chairman, there seems to be some misgivings in the minds of some of the gentlemen here about the amount of compensation, and that seems to have arisen, in some measure, at least, because of doubt on the part of some as to the power possibilities in this bill. When this bill was being considered by the committee I offered an amendment to section 6, line 16, as it appears in the bill, by adding the words 'or electric energy'. With those words in that section, the bill amounts to this, that San Francisco can take this water, and San Francisco may develop such power as it may develop from the drop of that water from the Hetch Hetchy to the level of the city reservoirs and San Francisco may sell this water or electric energy—to whom? To any other municipality that may come in under the provisions of this bill, or to any private individual in the city for consumption, or to any corporation in the city for consumption and only for consumption, and under this section it is absolutely impossible for San Francisco to *sell a drop of water or a bit of electric energy to any private individual or to any corporation for the purpose of re-selling it.*"

In other portions of the debates reported in Vol. 50 of the Congressional Record (pp. 462, c. 2; 3980 c. 1; 3996 c. 2; 4094 c. 2), it appears that members of the House and Senate were apprehensive that the City might sell the

electric energy to a private corporation, and that that corporation might resell it to its consumers at a substantial profit. Such experience on the part of the Government in granting storage rights to a power company in Arizona was reported by Representative Taylor in the hearings before the House Committee (Report on H.R. 6281, dated June 25, 1913, p. 123), and with respect to the Keokuk dam in the Mississippi River, by Senator Poindexter on the floor of the Senate, December 6, 1913 (Vol. 51 Cong. Rec. p. 301). Mr. Raker is quoted on page 12 of the Government's petition as saying that it was the purpose of the bill he had introduced to have San Francisco supply electric power and water to its own people.

What we do most earnestly contend is that there is nothing in the record in this case or in the Congressional Records at the time of the enactment of the Raker Act which indicates that the City of San Francisco represented to Congress, or that Congress intended that its distribution of its own energy to its own people would be accomplished solely through a municipally owned distribution system and without reference to the existing privately owned facilities. For example, the statements of the City Attorney at the hearings before the Committee on Public Lands clearly indicate that the problem being considered was one of water supply, and that the City intended to acquire and own its entire water system. There is not one word about the acquisition of a power distribution system. Congress was not concerned with the means used by the City to get the power to its people, so long as it did not part with title and control of its distribution.

While we think it unnecessary to go further than to point out that in the foregoing reports and debates Congress was concerned with the prohibition of sale for resale, and nothing further, if we were to assume with the Government that back of this prohibition was a Congressional policy of preventing private capital from making a profit out of the utilization of public resources, or obtaining a monopoly on the distribution of electric energy generated with water stored in part on public lands; still, one cannot read into Section 6 an intent that distribution through an agency contract should be prohibited.

If it had been the intention of Congress to provide that the City could distribute the electric energy generated on the Hetch Hetchy project to its people only through a municipally or publicly owned distribution system, as Secretary Ickes now contends, it certainly would have expressed that intention plainly and unequivocally in the Raker Act. The obligations placed upon the City therein are very specific under the language of Section 9 quoted, supra, page 3. It is made the duty of the City to first satisfy the needs of the land owners in irrigation districts for pumping sub-surface water for drainage or irrigation, and the needs of municipalities in those districts for actual public purposes, after which the City is expressly permitted to dispose of any surplus above these prior demands "for commercial purposes". Sections 9 (m) and 9 (n) make mandatory certain minimum power developments. As pointed out heretofore, at the time the Act was passed it was the intent of the City to utilize the greater part of the power in pumping its water supply over the Coast Range. If it had done that,

it is not conceivable and was not conceivable at the time the Act was enacted, that the development of electric energy prescribed by Congress in Sections 9 (m) and 9 (n) of the Act, would be anywhere nearly adequate to meet the then existing demand for electric energy in San Francisco. Under those sections the City was obliged to develop 10,000 horsepower within three years after completion of its works, 20,000 horsepower in ten years, and 30,000 horsepower in fifteen years. The total inadequacy of these developments to meet the power demands of a large city, particularly after satisfying the mandatory priorities in favor of irrigation districts bordering on the Tuolumne River and the then assumed physical necessity of pumping the water supply over the Coast Range is apparent upon even casual reflection. Certainly if Congress had intended that the City must acquire by purchase or construction, and periodically enlarge a municipally owned distribution system so as to keep this power developed on the Hetch Hetchy project entirely separate from the supplemental energy necessary to meet the demands of its people, Congress would have said so. As stated, no such provision appears in the Raker Act.

We submit that the contract in this case violates none of the policies stated by the Government in its petition (pp. 10-13) to be embodied in Section 6. The Pacific Gas and Electric Company has no monopoly on the Hetch Hetchy energy. As an agent for the City it does take delivery of this energy at the threshhold of the Bay region for the infinitesimal period of time necessary to transmit it 35 miles to San Francisco, performs upon it the services necessary to render it available to con-

sumers, and collects a price therefor prescribed by the City in the contract, to-wit, the lawful rates established by public authority in California. The Company retains out of these collections an amount which pays it, in addition to its operating expenses, a reasonable charge—not for utilization of the public lands granted to the City, but for its utilization of its own distribution system in San Francisco—and turns the rest of the money collected at the prescribed rates over to the City. This is no more a profit prohibited by the Raker Act than would be the case with a contractor's profit paid for his services and use of his equipment in building any unit of the project.

The City can terminate this relationship on one day's notice. It has the power of eminent domain. It can acquire the Company's plant by purchase or condemnation whenever its electors authorize such acquisition. It can duplicate the Company's plant with a competing system if it desires. The Government has failed to introduce or point out in the record one iota of evidence showing that the Company either has a monopoly or is making a profit out of the utilization of the public lands granted to the City. Such being the case, we say that there is no evidence that the alleged intent of Congress is being violated by the City through any hypertechnical construction of Section 6. The City is receiving a revenue from its present power development of approximately $2,200,000 per year (R. 416-418) through operation of this agreement. In the absence of proof to the contrary by the Government as plaintiff in this case, it is fair to assume that the profit, if any, from utilization of public lands to store and conduct water to the power house is all contained in this figure, and that it

goes to the City which built and operates this part of the project. The City competes with the Company in the generation of power as distinguished from its distribution.

There is neither allegation nor proof by the Government that the rates charged consumers in San Francisco for electricity are any higher under operation of the contract in question, and the regulation of the State Railroad Commission prescribed thereby, than would be the case if the City were to acquire the distribution system and operate it itself with municipal employees. There is not even a suggestion in the record that the rates charged for electric energy in San Francisco are inordinately high, and there is uncontradicted evidence (R. 287) that they have been repeatedly reduced during the life of this contract by the Railroad Commission which the City selects as its regulatory authority in the contract.

Finally, we ask the court to take judicial notice of the policy of the Government itself in recent years in construction of all the great Government storage projects in the western states under which it markets the electric energy derived from those projects, either to or through private corporations wherever the latter are established as the agencies by which the energy is distributed to the public. This practice is followed with respect to surplus power from the Government plant in Yosemite Valley, in the very Park involved here. It follows of necessity that the mere transmission and distribution of energy to consumers through privately owned systems is *not* a violation of any assumed general congressional policy that public resources shall not be developed by public agencies for private profit.

C. NO QUESTION OF IMPORTANCE IN THIS CASE JUSTIFIES REVIEW BY THE SUPREME COURT.

While the Raker Act is a Federal law and has not heretofore been interpreted by the court, it is a special statute dealing only with the rights of the City and County of San Francisco in a small area of the Yosemite National Park and Stanislaus National Forest. A judicial interpretation of this statute can scarcely furnish a precedent for the interpretation of any other statute. The questions involved are purely of local importance in San Francisco. The opinion of the Circuit Court of Appeals furnishes a careful and well written analysis of the facts and the law which should not be disturbed. The Government not only has suffered no damage or detriment of any kind but on the other hand has received a handsome income and profit under the operations of the City's project far exceeding in value that which it gave by its grant. It cannot possibly suffer any damage or detriment if the City is permitted to carry on under this agency agreement until such time as its voters may authorize it to carry out its charter declaration for public ownership of all utilities. On the other hand, a reversal of the views of the Circuit Court of Appeals would cause incalculable detriment to the City, to its taxpayers, and to its power consumers, and be of no benefit whatever to the Government.

There is no frustration of the powers of Congress. At the most there is merely a disagreement between the officials of San Francisco and the present Secretary of the Interior in the interpretation of a special Congressional grant. This situation, we submit, has been adequately resolved by the decision of the Circuit Court of Appeals for

the Ninth Circuit, and does not justify the issuance of a writ of certiorari.

Dated, San Francisco, California,
January 5, 1940.

Respectfully submitted,

JOHN J. O'TOOLE,
City Attorney
of the City and County of San Francisco,

DION R. HOLM,
Assistant City Attorney
of the City and County of San Francisco,

Attorneys for Respondent.

ROBERT M. SEARLS,
Of Counsel.